Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT MICHAEL DAMPTS,

Petitioner,

v.

ARNOLD HOLT and J.C. JILES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the dismissal of a writ of habeas corpus pursuant to 28 U.S.C. §2254 as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) 28 U.S.C. §2244(d) violate due process where the grace period for such filing was announced in an unpublished opinion after the grace period had already passed?

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PRAYER

Petitioner, Robert Michael Dampts, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on the 6th day of November 1998 affirming the District Court's dismissal of Petitioner's petition for habeas corpus relief and in support thereof states the following:

CITATION OF OPINION IN THE APPELLATE COURT

No. 98-6029 (U.S.C.A. 11th Cir.) (unpublished) was decided on November 6, 1998. Petitioner's timely petition for rehearing was denied on January 11, 1999.

JURISDICTION

1. The judgment and opinion Petitioner seeks review of is that of the United States Court of Appeals for the Eleventh Circuit entered on the 6th day of November 1998.

2. The United States Court of Appeals for the Eleventh Circuit denied the Petitioner's Petition for Rehearing on the 11th day of January 1999.

3. The statutory provision that confers jurisdiction on this Court to review this petition for a writ of certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

28 U.S.C. 2244. Finality of determination

. . . (d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recog-

nized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On May 26, 1992, in the Circuit Court of Mobile County, Alabama, Thirteenth Judicial Circuit, the petitioner-appellant entered a blind plea of guilty to two charges of robbery in the first degree and two charges of burglary in the first degree. He entered the blind plea on the advice of his attorney who had assured him that he "could get" the Petitioner a sentence of fifteen years on his plea of guilty. Before pleading guilty, the Petitioner signed a "Motion to Enter Guilty Plea" form which read "I further understand that after I am sentenced on my guilty plea that I still have a right to appeal from such sentence and if I am indigent, the

court will furnish me a copy of the transcript of the sentence proceedings and will furnish me with an attorney."

On July 10, 1992, the Petitioner appeared before the court for sentencing whereupon the judge stated: "Mr. Dampts, the court sentences you to serve a term in the State Penitentiary for life." All told, the Petitioner received four concurrent life sentences.

On November 23, 1992, from his prison cell in Fountain Correctional Center, the Petitioner penned a request to the Circuit Court of Mobile County, Mobile, Alabama asking for the records from all four of his cases as well as free transcripts of the proceedings held in each case and case action summaries. The reason that he gave for requesting these documents was that "he is trying to get the cases back in to the court and the records and transcripts of records are needed to aid the petitioner in these legal matter."[sic] Attached to the motion was an oath of pauperis and forma pauperis in which the Petitioner explained that he was "without means of any income asept a state dollar in which the State of Alabama gives him once a month,"[sic] and that he had "no stocks or bonds or savings account nor property, nor car house, to sell to pay any filing fee or any court cost for said motion for transcripts of court records et al." The Petitioner's motion for free transcripts was denied on January 8, 1993.

In February 1996, the petitioner-appellant's family retained present counsel, Elliott T. Price, to represent petitioner-appellant in the instant action.

On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-

132, 110 Stat. 1214 (codified as amended at 28 U.S.C. 2244 and 2254) was enacted.

In October 1996, counsel for the Petitioner received "what appears to be the entirety of the [Petitioner's] court files that were and are in the possession of the clerk of the circuit of Mobile County, Alabama, Thirteenth Judicial Circuit."

On May 7, 1997, the United States District Court for the Southern District of Alabama, Southern Division, in an unpublished opinion and order recognized a one-year grace period for filing habeas petitions after the enactment of the AEDPA; the unpublished opinion and order, however, noted that the grace period had expired 14 days prior on April 23, 1997.

The Petitioner filed his petition for habeas corpus relief pursuant to 28 U.S.C. 2254 and an accompanying memorandum of law in the United States District Court for the Southern District of Alabama, Southern Division on August 5, 1997. On October 10, 1997, the Respondents filed their answer and on October 31, 1997, they filed a supplemental answer.

The United States Magistrate Judge William H. Steele filed his Report and Recommendation with the district court on November 20, 1997. The Petitioner filed a statement of objection to the Report and Recommendation of the magistrate judge, and a supporting brief, on December 5, 1997.

On December 10, 1997, the United States District Court Judge Richard W. Volimer, Jr. entered an order adopting the Report and Recommendation as the opinion of the court and dismissing the Petitioner's petition

brought pursuant to 28 U.S.C. 2254 as time-barred pursuant to 28 U.S.C. 2244(d).

On January 8, 1998, the Petitioner filed a notice of appeal and a motion for certificate of appealability.

United States District Court Judge Richard W. Volimer, Jr., granted the motion for certificate of appealability on May 21, 1998.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The appeal was from the final order of the United States District Court for the Southern District of Alabama, Southern Division, dismissing the petition brought by Petitioner pursuant to 28 U.S.C. 2254. The appellate court had jurisdiction pursuant to 28 U.S.C. 2253(a) and (c) and Rule 22(b) of the Federal Rules of Appellate Procedure. The United States District Court for the Southern District of Alabama, Southern Division, granted Petitioner's motion for certificate of appealability.

REASONS FOR GRANTING THE WRIT

1. It is not permissible to announce and impose the grace period after the grace period had already expired because it deprives a person in Petitioner's position of due process and the opportunity to take advantage of the grace period.

On May 7, 1997, the United States District Court for the Southern District of Alabama, Southern Division, decided *Jackson v. Deloach*, C.A. 96-0914-CB-S (S.D. Ala. May 7, 1997), an **unpublished** order which im-

posed a one-year grace period for filing habeas petitions in the wake of the AEDPA; the decision also held that the grace period it had just announced and imposed had expired fourteen days prior on April 23, 1997. *Jackson* at page 5.

The grace period thus announced and imposed in *Jackson* was nothing short of worthless for the petitioner-appellant and others in his position. Neither the petitioner nor anyone in his position had the opportunity to take advantage of the grace period because by the time that it was announced and imposed the time for filing had already passed. This is also assuming that petitioner could even have found out about the secretive decision of the Eleventh Circuit.

It has been said that the purpose for adopting the "grace period" was "to avoid any severe injustice." Ironically, for the petitioner and others in his position, the grace period has caused nothing but "severe injustice."

Tolling the grace period for enough time to render the petitioner's section 2254 petition timely under the AEDPA is the proper and equitable remedy because the petitioner and others in his position did not have, nor could they have had, actual or constructive notice of the grace period and its filing requirement prior to its expiration.

Among the factors that the courts consider in assessing claims of equitable tolling are the plaintiff's lack of actual and/or constructive notice of the filing requirements. *Kelly v. National Labor Relations Board*, 79 F.3d 1238, 1248 (1st Cir. 1996).

The petitioner in this case had no actual notice of the grace period and its filing requirement, i.e., file on or

before April 23, 1997, because the grace period and its filing requirement were not "announced and imposed" until 14 days after it had expired, and even then the "announcement and imposition" amounted to nothing more than an unpublished opinion and order.

For the same reason, the petitioner did not have constructive notice of the grace period and its filing requirements.

Equitable tolling is available where extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. *Calderon v. U.S. Dist. Ct. for Central Dist. of Cal.*, 128 F.3d 1283, 1288 (9th Cir. 1997).

Equitable tolling is appropriate when the circumstances that caused the plaintiff to miss a filing deadline are out of his hands. *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990).

The petitioner and others in his position could not have filed their petitions on time and could not have avoided missing the tolling of section 101's statute of limitation. *Calderon*, 128 F.3d at 1289.

Remembering that the purpose of the doctrine of equitable tolling is to shelter the plaintiff from the statute of limitations where strict application would be inequitable, it becomes clear that tolling the grace period for enough time to render the petitioner's section 2254 petition timely under the Act is the proper and equitable remedy where the petitioner and others in his position did not have, nor could they have had, actual and/or constructive notice of the grace period and its filing requirement prior to its expiration, and the dis-

trict court's failure to so utilize the doctrine of equitable tolling was an abuse of discretion.

Since AEDPA did not provide for any grace period at all and terminated all rights to file a habeas corpus petition (which previously had no such time limit) except for those prisoners who were still within the one-year period prescribed by AEDPA, the circuits were at liberty to allow or disallow a grace period of any length. It so happened that the circuits that published a grace period adopted a one-year period to conform with the period in the statute, but a longer or shorter period could easily have been announced as well.

Thus, if a circuit was to create a grace period in the name of justice, it should publish the new policy in a manner that the citizenry would reasonably hear about it and as soon as the policy took effect, not after it already expired!

CONCLUSION

For the reasons stated above, the petitioner, Robert Michael Dampts, urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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